

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

**ESTATE OF ARMENTIA CHATMON,
a/k/a ARMENTER CHATMON,
p/k/a “BO CARTER” or “BO CHATMON”**

Plaintiff,

v.

**WARNER MUSIC GROUP CORP.,
SONY/ATV MUSIC PUBLISHING, EMI
MILLS MUSIC, INC., RHINO
ENTERTAINMENT COMPANY, d/b/a RHINO
RECORDS, VIACOM, INC., d/b/a VIACOM
INTERNATIONAL, INC., FOLKWAYS
MUSIC PUBLISHERS, INC., HAL LEONARD
LLC, J.W. PEPPER & SONS, INC., ERIC
CLAPTON, AND JOHN DOE NOS. 1-10.**

**No. 3:16-cv-02722
Judge Waverly Crenshaw
Mag. Judge Barbara Holmes**

**REPLY IN SUPPORT OF J.W. PEPPER & SON, INC.’S
MOTION TO DISMISS UNDER RULES 12(b)(2) and 12(b)(3)**

J.W. Pepper & Son, Inc.¹ (“Pepper”) respectfully submits this Reply in support of its Motion to Dismiss under Rules 12(b)(2) and 12(b)(3) (Docs. 49-50) and to address issues raised in Plaintiff’s Response (Doc. 54).

Contrary to Plaintiff’s assertion, the three-part test of specific jurisdiction from the seminal decision of Southern Machine Co. v. Mohasco Industries, Inc., 401 F.2d 374, 381 (6th Cir. 1968), is alive and well in Tennessee. In fact, this Court relied on it less than one month ago in Bulso v. O’Shea, No. 3:16-cv-0040, 2017 WL 563940, at *2 (M.D. Tenn. Feb. 13, 2017) (unpub’d) (Crenshaw, J.). And this Court routinely relies on it. See Up-Rite Systems, Inc. v. Allender, No. 3:15-cv-710, 2016 WL 4702801, at *4 (M.D. Tenn. Sept. 8, 2016) (unpub’d)

¹ Improperly identified in the Caption and the Complaint as J.W. Pepper & Sons, Inc.

(Crenshaw, J.); In:cite Media, LLC v. Christmas of Light Productions, LLC, No. 3:16-cv-00629, 2016 WL 3384937, at *2 (M.D. Tenn. June 20, 2016) (unpub'd) (Crenshaw, J.).

Despite this Court's continued reliance on Mohasco, Plaintiff insists that, as of 1981, Mohasco is no longer controlling. See Plaintiff's Response (Doc. 54) at PID # 238. Relying instead on a 1981 decision from the Tennessee Court of Appeals, Plaintiff neglects to address, let alone rebut Pepper's position that its connection to Tennessee is not "substantial" (from the first prong of purposeful availment), as required under Walden v. Fiore, 571 U.S. ___, 134 S. Ct. 1115, 1121 (2014). It is well accepted within the Sixth Circuit that "a non-moving party waives an argument by failing to address the argument in its response brief." Keys v. Dart Container Corp. of Kentucky, No. 1:08-CV-00138-JHM, 2012 WL 2681461, at *7 (W.D. Ky. July 6, 2012) (unpub'd); accord Sommer v. Davis, 317 F.3d 686, 691 (6th Cir. 2003) (holding party abandoned position by failing to present any argument on the subject in its brief). By failing to address Pepper's position on the "substantiality" factor, Plaintiff waived any objection.

Similarly, Plaintiff completely fails to address Pepper's position that the exercise of jurisdiction here would be unreasonable, as required under the third Mohasco factor. The only Declaration Plaintiff offers is from its counsel, not a fact witness, and Plaintiff's counsel does not offer any facts that contradict the Declaration of Lee Paynter, COO at Pepper, (Doc. 51). "Once challenged, the Plaintiff ha[s] the burden of making a prima facie showing that jurisdiction exist[s] through the production of affidavits and other written evidence." First Community Bank v. First Tenn. Bank, 489 S.W.3d 369, 402 (Tenn. 2015). Here, Plaintiff has failed to carry its burden. As a result, Mr. Paynter's Declaration stands unrefuted.

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Plaintiff similarly failed to respond to Pepper's position that jurisdiction over Pepper would be unreasonable. See e.g., Up-Rite, 2016 WL 4702801, at *5 (quoting Bird v. Parsons, 289 F.3d 865, 875 (6th Cir. 2002) (noting several factors help determine whether jurisdiction would be reasonable, including "the burden on the defendant, the interest of the forum state, the plaintiff's interest in obtaining relief, and the interest of other states in securing the most efficient resolution of controversies"). As Mr. Paynter's declaration shows, the burden of defending in this state would be high. The only person connected to this dispute with a tie to Tennessee is Plaintiff's counsel. Pennsylvania would be much more convenient for Pepper, whose witnesses and documents are all located near Philadelphia. Under Keys and Sommer, Plaintiff waived any argument on the third Mohasco factor by failing to address it in its response brief. For all these reasons, it would be unreasonable to exercise jurisdiction over Pepper.

For the same reasons, because personal jurisdiction is lacking over Pepper, venue here is also unreasonable.

Finally, Pepper notes that it would be amenable to jurisdiction and venue in the Eastern District of Pennsylvania. While the Middle District of Tennessee soon will have only two District Judges and four Magistrate Judges, the website for the Eastern District of Pennsylvania shows that it has 20 District Judges, 12 Senior Judges and 11 Magistrate Judges. A transfer to Pennsylvania would help alleviate the burden presently facing this District.

For the reasons stated above and in Pepper's Memorandum of Law (Doc. 50), the Court should dismiss the Complaint against Pepper for lack of personal jurisdiction and for improper venue.

Respectfully submitted,

/s/ Stephen J. Zralek

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document, on March 7, 2017, via ECF, on:

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